FILED
MAR 3 1972
E. ROBERT SEAVER, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-1122

BENEFICIAL FINANCE CO. and EDWARD R. NEWHALL,
Petitioners,

v.

COMMONWEALTH OF MASSACHUSETTS,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME JUDICIAL COURT FOR THE COMMONWEALTH OF MASSACHUSETTS

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v.

COMMONWEALTH OF MASSACHUSETTS,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME JUDICIAL COURT FOR THE COMMONWEALTH OF MASSACHUSETTS

Petitioners Beneficial Finance Co. and Edward R. Newhall pray that a writ of certiorari issue to review the opinion and judgment of the Supreme Judicial Court for the Commonwealth of Massachusetts entered November 4, 1971, which affirmed Beneficial's convictions in two separate jury trials and Newhall's conviction at the second trial.

OPINION BELOW

The opinion of the Supreme Judicial Court for the Commonwealth of Massachusetts, printed at page 48a of the separately bound Appendix,[1] has not yet been

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[1] The separately bound Appendix to this Petition is cited as "App."

officially reported but is unofficially reported at 275 N.E. 2d 33.

JURISDICTION

The opinion and judgment of the Supreme Judicial Court for the Commonwealth of Massachusetts were entered on November 4, 1971. On January 25, 1972, Mr. Justice Brennan granted an extension of time until March 3, 1972, in which Petitioners could file this Petition. The Jurisdiction of this Court is invoked under 28 U.S.C. § 1257(3).

QUESTIONS PRESENTED

1. Is the right of each defendant to a separate jury determination of innocence or guilt, as guaranteed by the Sixth and Fourteenth Amendments, violated where two trials each consolidated against more than a dozen defendants an assortment of conspiracy and substantive charges totaling 77 and 57 counts, respectively, and where "practical and human limitations" made it impossible for the jurors to recall, assess and apply hundreds of evidentiary restrictions and extensions announced during the total 16 months of trial?

2. Is the right of a defendant to a fair and impartial jury verdict, as guaranteed by the Due Process Clause of the Fourteenth Amendment, violated where the prosecution deliberately suppressed critical documents which directly impeach the uncorroborated testimony of its key witness?

3. Is the right of a defendant to be free from multiple prosecutions, as guaranteed by the Double Jeopardy Clause of the Fifth Amendment (as applied by the Fourteenth Amendment), violated where the Commonwealth (a) secured two virtually identical conspiracy indictments; (b) conceded that they arose out of the same continuing course of conduct; (c) carved out one

portion of the continuing conspiracy and prosecuted it in the first trial; (d) then prosecuted the "overall" conspiracy in the second trial; and (e) in doing so, relied upon the same key witness, testifying to the same meetings among the same participants, to prove both conspiracies?

4. Is the right of a defendant to a single, unfettered jury verdict of innocence or guilt, as guaranteed by the Sixth and Fourteenth Amendments, violated where the jury was required to answer in writing several prejudicial, catechizing questions before returning its general verdict?

5. Does the Due Process Clause of the Fourteenth Amendment render invalid criminal indictments secured by having the State Attorney General and four other prosecutors physically present and watching over the Grand Jurors throughout their voting as well as their deliberations, directing their attention to certain evidence, answering questions of "law and language", and ceremoniously signing each of the pre-drafted indictments as they are "returned" by the jurors?

Questions 1 and 5 apply to Petitioners Beneficial Finance Co. ("Beneficial") and Edward R. Newhall ("Newhall"). Questions 2, 3, and 4 apply only to Beneficial.

CONSTITUTIONAL PROVISIONS INVOLVED

The Fifth Amendment to the United States Constitution provides in pertinent part:

> * * * nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb * * *.

The Sixth Amendment to the United States Constitution provides:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury * * *, and * * * to be confronted with the witnesses against him * * *.

The Fourteenth Amendment to the United States Constitution provides in pertinent part:

> * * * nor shall any State deprive any person of life, liberty, or property, without due process of law * * *.

STATEMENT OF THE CASE

This case arises out of two separate jury trials on two separate groupings of indictments against numerous corporate and individual defendants. Beneficial was prosecuted in both trials; Newhall was prosecuted only in the second trial. Beneficial, a Delaware corporation, held the equitable interests in three Massachusetts business trusts which owned offices engaged in the consumer loan business. Newhall was an employee of Beneficial Management Corporation, a subsidiary of Beneficial which performed legal and accounting services for the three business trusts.[2]

All indictments in both trials were returned early in 1964 by a special Grand Jury. In substance, the indictments charged that over the years 1957-1964 various small loan companies and certain of their officers or employees had conspired to bribe or had offered bribes to certain state officials who had allegedly conspired to solicit or had solicited such bribes.

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[2] Beneficial Management Corporation was named as a defendant in conspiracy indictments involved in both trials, but was held not subject to the jurisdiction of the court and thus was not tried. John M. Farrell ("Farrell"), vice-president of the management corporation, and Francis T. Glynn ("Glynn"), an employee of a Massachusetts affiliate of both the management and parent companies, were convicted in both trials and will file a separate Petition for a Writ of Certiorari.

At pretrial hearings, Judge Quirico of the Superior Court (assigned to both trials) denied Petitioners' motions to dismiss the indictments. These motions asserted that various aspects of the Grand Jury proceedings—including the presence of multiple prosecutors during deliberation and voting—abridged their right to due process under the Fourteenth Amendment.[3] Judge Quirico also denied motions for severance which asserted that trial on the multiple-defendant, multiple-offense indictments violated Petitioners' rights under the Sixth and Fourteenth Amendments.[4]

The First Trial

The first trial began July 18, 1966, more than two years after the indictments had been returned. Fifteen defendants were before the Superior Court, charged with an assortment of conspiracies and substantive offenses in 48 indictments having 77 counts.[5]

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[3] Petitioners challenged the indictments on these constitutional grounds by pre-trial motions to dismiss and other pleadings and exceptions; by assignments of error in both trials; and in briefs before the Massachusetts Supreme Judicial Court. Brief for Appellant Beneficial on Pre-Trial Issues, at 5-6, 81-85; Brief for Appellants Glynn, Farrell, and Newhall, Second Trial, at 15, 18, 20, 44. The Supreme Judicial Court expressly rejected these federal constitutional claims. App. 52a-69a.

[4] Petitioners challenged the groupings of indictments on constitutional grounds by various motions for severance and exceptions in both trials; by assignments of error; and in briefs before the Massachusetts Supreme Judicial Court. Brief for Appellant Beneficial, First Trial, at 3-4, 21-24; Brief for Appellant Beneficial, Second Trial, at 33-35; Brief for Appellants Glynn, Farrell, and Newhall, Second Trial, at 33-44. The Supreme Judicial Court rejected these contentions at App. 69a-74a and at App. 167a-173a, 230a-231a, where the Court further considered Petitioners' subsequent motions and other pleadings challenging on federal constitutional grounds joinder in the first and second trials and its prejudicial consequences during both trials. See note 10, *infra*.

[5] Two state officials, Martin J. Hanley ("Hanley") and Morris Garfinkle ("Garfinkle"), were charged in one indictment with

The government's principal witness, William F. Heath ("Heath"), an unindicted co-conspirator, gave testimony covering the years 1960 to 1963 purporting to show that a bribery conspiracy intended to influence state regulation of interest rates charged by small loan companies arose at certain 1962 restaurant meetings. Heath's expense account vouchers—which substantially contradicted vital parts of the prosecution's case—were not disclosed to defense counsel during the first trial even though they had been used before the Grand Jury, the prosecutor was aware of them, the prosecutor had been ordered to produce all relevant materials before the Grand Jury which bore on these luncheon meetings, and he purported to have done so.[6] When the vouchers inadvertently came to light during the second trial, Beneficial filed a motion for a new trial, asserting that the deliberate suppression of the vouchers violated its right to due process under the Fourteenth Amendment.[7]

The Commonwealth limited 218 items of documentary or testimonial evidence presented from August 11 to October 6, 1966, to particular defendants only. The limitations announced to the jurors at various times

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conspiring to request bribes from various defendants and others. Each was charged in a series of 16 substantive indictments, either with requesting bribes or with requesting and accepting bribes. Two indictments charged 13 individual and corporate defendants at trial (including Beneficial) with conspiring together, with three other defendants, and with four named co-conspirators to offer bribes to Hanley and Garfinkle, respectively. Each of the same 13 defendants was separately charged in a two-count indictment with bribing Hanley and Garfinkle. Forty-two of the 48 indictments (and 68 of the 77 counts) did not charge or even name Beneficial.

[6] See notes 28-29, *infra*.

[7] Beneficial raised this issue by motions for new trial and exceptions; by assignments of error; and in its brief before the Massachusetts Supreme Judicial Court. Brief for Appellant Bene-

included 50 different combinations of individual and corporate defendants. After finding that the jury could conclude that conspiracies had existed,[8] the Superior Court granted (in large part) motions by the Commonwealth to *change* the limitations on 48 items of evidence. On November 2, again at the Commonwealth's request, the court announced to the jury nearly 700 extensions as to the 48 items, in a 38-page instruction lasting 90 minutes. While instructing the jury to "pay attention" and "give effect" to the original and expanded limitations on the evidence, the court did not restate the original limitations, and referred only generally to the particular items of evidence which had been introduced over the preceding 72 trial days.[9] The hundreds of new limitations added to the original limitations on the 48 items—reflected in Exhibit A to this Petition—were not again read to the jury during the remainder of the case.

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ficial, First Trial; at 6, 84-85. The Supreme Judicial Court expressly rejected the federal constitutional claims. App. 173a-180a.

[8] Prior to the time that the court was called upon to act as trier of fact in determining whether conspiracies existed among the corporate defendants, the prosecutor on four separate occasions had made *ex parte* representations to the trial judge that five named out-of-state witnesses—none of whom ever testified, although one was present and available to testify—had "personal knowledge" that the charges in the indictments on trial were true. These representations were made in requests for certificates of process against the out-of-state witnesses, which requests could have been directed to *any* judge of the Superior Court (Mass. Gen. Laws Ch. 233, §§ 13A-13D). On first learning of the *ex parte* representations well after the first trial (the court had impounded the relevant papers during trial), Beneficial moved for a new trial on Sixth and Fourteenth Amendment grounds.

[9] For example, in its November 2 charge to the jurors, the Superior Court referred to testimony by a prosecution witness—some six weeks earlier—as to whether "he was ever in the Boston Club or Tiffany's * * * and if so, [whether] it was with reference to the 1962 rate hearings, and whether he went there with some other person, and, if so, who that person was, whether certain other

By various exceptions and motions for severance, Beneficial asserted that the confusion arising from the number of indictments, counts, defendants, conspirators, items of evidence, original limitations, and extended limitations precluded any one defendant from receiving separate attention from the jury, in violation of its rights to confrontation, cross-examination, a jury trial and due process under the Sixth and Fourteenth Amendments.[10]

On December 15, 1966, more than four months after the jury was sworn, 39 indictments in 57 counts, requiring 72 determinations of guilt or innocence as to ten defendants, were submitted to the jury. The court's final instructions ran five hours and cover 140 transcript pages. In telling the jurors to give effect to the original and expanded evidence limitations, the Superior Court neither summarized the evidence nor restated the limitations. The court refused to instruct the jurors to acquit if they were "uncertain as to which evidence may be considered against each defendant."

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persons were or were not there when he was there." On the assumption they could recall this testimony and its original limitations, the jurors were instructed to further consider this evidence only against "Barber, Pratt, Farrell, Woodcock, Beneficial, Household and Liberty, on conspiracy Indictment 11910, and Beneficial as to Count 2 of Indictment 11901." I Tr. 5217. (The transcript of the first trial is cited as "I Tr." and that of the second trial as "II Tr.")

[10] Beneficial also raised these issues as to both trials by assignments of error and in briefs before the Massachusetts Supreme Judicial Court. Brief of Appellant Beneficial, First Trial, at 4-5, 24-35; Brief of Appellant Beneficial, Second Trial, at 37-40. Newhall likewise raised these issues as to the second trial. Brief of Appellants Glynn, Farrell, and Newhall, Second Trial, at 33-44. The Supreme Judicial Court expressly rejected the federal constitutional claims at App. 167a-173a, 230a-231a. The court incorrectly stated that one constitutional argument on this issue—denial of the opportunity of cross-examination—was made "apparently for the first time" on appeal. See Beneficial's Assignment of Errors in First Trial Nos. 42 and 50; Brief of Appellant Beneficial, First Trial, at 26, 28.

Over the objection of Beneficial and others,[11] the court submitted special verdict forms (p. 25, *infra*) as to each substantive bribery indictment, to be answered by the jury before finding the defendant "guilty or not guilty" of the offense charged. On December 18, 1966, the jury returned guilty verdicts against all remaining ten defendants, and fines were subsequently imposed on Beneficial.[12]

The Second Trial

The second trial began July 17, 1967. It ended June 10, 1968—almost 11 months later—after evidence had been introduced covering 13 years (including testimony as to the same allegedly conspiratorial meetings described in the first trial) purporting to show conspiracy and conduct during 1957-1964 intended to influence state regulation of small loan businesses. During more than 200 trial days, 1084 exhibits were identified, 232 exhibits were admitted, 42 witnesses testified, and 1222 changes in evidence limitations were announced to the jurors.

Petitioners Beneficial and Newhall were among six corporate and eight individual defendants before the Superior Court charged in one indictment with conspiring with four other persons named as defendants and with eight named co-conspirators (including Heath) to bribe Hanley. Neither Beneficial nor Newhall was charged or named in the other 20 indictments

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[11] I Tr. 7167, 7313. The Supreme Judicial Court expressly rejected the federal constitutional claims that submission to the jury of the special verdict forms violated Sixth and Fourteenth Amendment rights. App. 156a-157a.

[12] All defendants except Hanley and Garfinkle were convicted on all charges. The latter were convicted of conspiracy and of requesting bribes but were acquitted as to charges of accepting bribes. Beneficial received separate, cumulative fines on each conspiracy indictment and on each count of the substantive indictment.

grouped by the Commonwealth for trial—one indictment charging another finance company with bribing Hanley, and 19 indictments in 55 counts charging Hanley with requesting or accepting bribes from persons (not including either Petitioner) connected with the small loans industry or with violating a "conflict-of-interest" statute. Petitioners' motions for severance or mistrial at various points during the trial were denied.[13]

The Commonwealth's limitations on 229 pieces of evidence presented from August 16 to November 14, 1967, included 61 different combinations of individual and corporate defendants. On December 12, 103 days into the trial, the court (as requested by the Commonwealth) announced to the jury hundreds of limitation extensions with respect to 66 items of evidence. Exhibit B to this Petition graphically illustrates the court's action. As in the first trial, Petitioners asserted that the confusion arising from the joinder of indictments and defendants and from the incomprehensible evidence limitations and extensions deprived them of their constitutional rights under the Sixth and Fourteenth Amendments.[14]

After the Commonwealth rested, Beneficial renewed its motions to dismiss (made at the start of the trial) which asserted that fragmenting into two trials what the prosecution had called "one single course of conduct"—a continuing conspiracy to bribe Hanley over the period 1957 to 1964—violated the Fifth Amendment guarantee against double jeopardy (as applied by the Fourteenth Amendment).[15]

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[13] See notes 4 and 10, *supra*.

[14] See note 10, *supra*.

[15] Beneficial raised this issue by various motions and exceptions; by assignments of error; and in its brief before the Massachusetts

On June 6, 1968, after the jury had heard evidence on 97 trial days over a ten-month period, 18 indictments in 39 counts (requiring 46 determinations of guilt or innocence as to nine defendants) were submitted to the jury. The court's final instructions lasted more than five hours and cover 185 transcript pages. As in the first trial, the Superior Court neither summarized the evidence nor restated the evidence limitations; the jurors were simply told to keep in mind some 5,000 different applications of bits and pieces of evidence.

On June 10, 1968, the jury returned verdicts of guilty as to each defendant on each indictment and count. Newhall was sentenced to serve one year at hard labor, and a fine (cumulative to the fines in the first trial) was imposed on Beneficial.

Decision on Appeal

Petitioners appealed their convictions to the Massachusetts Supreme Judicial Court, advancing numerous grounds for reversal, including the federal constitutional claims set forth herein. The court affirmed all convictions appealed by various defendants from both trials. App. 245a.

REASONS FOR GRANTING THE WRIT

A. The mass confusion at these trials violated each Petitioner's right to due process.

The trials below strained the jury system beyond its tolerance. The months of testimony, hundreds of exhibits, thousands of evidence limitations and extensions, and multiplicity of defendants, counts and in-

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Supreme Judicial Court. Brief of Appellant Beneficial, Second Trial at 4-5, 35. The Supreme Judicial Court expressly rejected these double jeopardy contentions at App. 74a-76a.

dictments made it impossible for the jurors to recall, assess and apply as to each separate defendant on each separate charge only the evidence admissible against that defendant on that charge. Petitioners were thereby deprived of one "important element of a fair trial" —the requirement that the jury treat each defendant in a joint prosecution as if separately tried, considering "only relevant and competent evidence bearing on the issue of guilt or innocence." *Bruton* v. *United States*, 391 U.S. 123, 131 n.6 (1968), citing *Blumenthal* v. *United States*, 332 U.S. 539, 559-60 (1947).

In affirming all convictions arising from the two trials, the Massachusetts Supreme Judicial Court relied heavily on its presumption that regardless of the volume or complexity of evidence, "jurors are expected to follow instructions * * *." App. 169a. These trials are clearly instances where the "risk that the jury will not, or cannot, follow instructions is so great, and the consequences of failure so vital to the defendant, that the practical and human limitations of the jury system cannot be ignored."[16] Any presumption that jurors can store thousands of discrete bits of information over five- and eleven-month proceedings, and then retrieve differing parts of that data in making 72 determinations of guilt or innocence in the first trial and 46 in the second, simply flies in the face of these "practical and human" limitations. The actual facts—not presumptions about the jurors' ability to perform mental gymnastics—show how each defendant's right to separate consideration of guilt or innocence was jeopardized throughout the trials.

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[16] *Bruton* v. *United States*, *supra*, 391 U.S. at 135; *Roberts* v. *Russell*, 392 U.S. 293, 295 (1968) (*Bruton* applied retroactively since erroneous reliance on cautionary instructions "presents a serious risk that the issue of guilt or innocence may not have been reliably determined").

In briefest outline, the facts about the first trial are these:

—The prosecution consolidated charges against Beneficial with those against 14 other defendants, joining in one trial 48 indictments alleging conspiracies and substantive offenses in 77 counts (the majority of which did not charge or even name Beneficial);

—The trial lasted five months and was reported in 7,491 transcript pages;

—218 items of evidence were admitted as to particular defendants only, in 50 different combinations of individual and corporate defendants;

—At the request of the prosecution, the limitations on 48 of these items were *changed* in a manner which involved nearly 700 extensions;

—The changes in limitations were read to the jury only once, as a 38-page instruction lasting 90 minutes, six weeks prior to the jurors' deliberations; and

—At the end of the trial the court gave five hours of instructions (140 transcript pages), and then required the jury to make 72 determinations of guilt or innocence.

The complexity and length of the second trial, and the resulting confusion to the prejudice of each Petitioner, are reflected in the following factual outline:

—The prosecution consolidated charges against Petitioners Beneficial and Newhall with those against 13 other defendants, joining in one trial 21 indictments alleging conspiracy and substantive offenses in 57 counts (only one of which counts charged or even named either Petitioner);

—The trial consumed 222 trial days over an 11-month period and was reported in 11,800 transcript pages filling 223 volumes;

—229 items of evidence were admitted as to particular defendants only, in 61 different combinations of individual and corporate defendants;

—At the request of the prosecution, the limitations on 66 of these items were *changed* in a manner which involved more than 1,000 extensions;

—The changes in limitations were read to the jury only once, in a 17-page charge, six months prior to the jurors' deliberations, and

—At the end of the trial the court gave more than five hours of instructions (185 transcript pages), and then required the jury to make 46 determinations of guilt or innocence, keeping in mind some 5,000 different applications of bits and pieces of evidence.

Neglecting this Court's strict direction to provide "impregnable" barriers in multi-defendant prosecutions to prevent "transference of guilt over the border of admissibility",[17] the trial court below compounded the prejudice to each defendant which accrued in the early months of the trials[18] by acceding to the Com-

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[17] *Blumenthal* v. *United States*, *supra*, 332 U.S. at 559-60.

[18] In addition to the prejudice arising in each trial from the 50 and 61 different varieties of initial limitations on more than 200 items of evidence, defendants were not insulated from the impact of prejudicial publicity before or during trial. The court refused to instruct the jurors not to read or watch accounts of the trials, and refused to ask the jurors whether they had read or seen actual instances of adverse press coverage (for example, a Saturday Evening Post interview in September, 1966 with Attorney General Brooke, citing the pending criminal case as illustrating that Brooke "campaigned against sin"). See I Tr. 521, 1311 (Boston Globe article), 2232 (Brooke interview), 5102 (Boston Herald article referring to "bribery" by small loans companies); II Tr. 506, 1365, 1416 (TV reports that defendants had been convicted in first trial). The court virtually invited the jurors to look for press coverage by instructing them not to consider "in your ultimate decision" anything "you read or see or hear from any other source * * * concerning this case * * *." App. 154a.

monwealth's request to announce to the jurors—in a hopelessly confusing manner—changes in limitations on various bits and pieces of evidence.[19] The trial court's announcement was stupefying, the limitations were incomprehensible, and the prejudice to each defendant was irredeemable.[20] Further, the Commonwealth's consolidation of indictments required the jurors to do more than link each piece of limited testimony only to one or more of ten defendants. Without benefit of charts (such as those printed as Exhibits A and B) to follow the maze of evidence extensions, the jurors were instructed to segregate the items of testimony by indictments and counts of indictments.[21]

It would be impossible to summarize in this Petition all of the confusion in these mass conspiracy trials.

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[19] Prior to the time that the court extended various pieces of evidence against additional defendants, the prosecutor had made four separate *ex parte* representations to the trial judge that certain witnesses (none of whom ever testified) had "personal knowledge" that the charges in the indictments were true (see note 8, *supra*). While space limitations preclude making in this petition a full argument demonstrating that these *ex parte* representations violated Beneficial's rights under the Sixth and Fourteenth Amendments(see, *e.g.*, *Haller* v. *Robbins*, 409 F. 2d 857 (1st Cir. 1969)), Beneficial reserves the right to brief fully this issue if certiorari is granted.

[20] For example, some pieces of evidence were extended against all three corporate defendants (No. 20); some against two (No. 19); and some against one corporate defendant other than Beneficial (Nos. 14, 18). Some testimony was admitted as to individual defendants only (No. 5). See I Tr. 5202-39. (The numbers cited reflect the trial court's numbering of items of evidence.)

[21] For example, at the first trial the court had admitted evidence against Beneficial in some instances only on the two conspiracy indictments; in other instances, on one conspiracy indictment and one count of the substantive indictment; in others, on both conspiracy indictments but only on one count of the substantive indictment; and in still others, on both conspiracy indictments and both counts of the substantive indictment. Equally confusing evidence patterns were constructed by the prosecution against the individual defendants at each trial.

Only a computer could record the thousands of evidence limitations at the 11-month second trial—one computation shows that the jurors were expected to keep in mind some 5,000 different applications of items of evidence—and separately print out the pertinent data admissible in making each of 46 determinations of guilt or innocence. The human mind cannot perform such feats.[22]

Commentators have repeatedly pointed out the inevitable prejudice which results from engulfing any one defendant in such a proceeding,[23] and courts have concluded that only severance can safeguard the rights of each accused. *United States* v. *Quinn*, 365 F.2d 256, 265 (7th Cir. 1966); *United States* v. *Moreton*, 25 F.R.D. 262, 263 (W.D.N.Y. 1960). And as this Court has recognized, since the dangers of a mass trial are

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[22] *Bruton* v. *United States*, *supra*; *United States* v. *Central Supply Ass'n*, 6 F.R.D. 526 (N.D. Ohio 1947); *United States* v. *Standard Oil Co.*, 23 F. Supp. 937 (W.D. Wisc. 1938); *United States* v. *Bufalino*, 285 F. 2d 408, 417-418 (2d Cir. 1960).

[23] For example, one study succinctly states:

> The volume of testimony which must be understood and retained by the jury may be so overwhelming that a rational verdict is practically impossible. The large number of witnesses and exhibits and the extended time of trial add to the possibility of confusion. The presence of a large number of parties makes it difficult to give a separate and informed consideration to each party's case. * * * Finally, the sheer volume of the single mass trial multiplies the possibility of error beyond that found in the ordinary trial, particularly in criminal cases, where there is always the danger of guilt by association. [Note, *The Challenge of the Mass Trial*, 68 Harv. L. Rev. 1046, 1047 (1955) (footnotes omitted).]

See also *Developments in the Law—Criminal Conspiracy*, 72 Harv. L. Rev. 920, 980-81 (1959); Panel Discussion, *The Problems of Long Criminal Trials*, 34 F.R.D. 155 (1963); *Proc. of the Seminar on Protracted Cases*, 21 F.R.D. 395 (1957); Kaufman, *The Apalachian Trial*, 44 J. Am. Jud. Soc. 53, 58 (1960).

magnified where conspiracies are charged, multi-defendant conspiracy prosecutions "call for use of every safeguard to individualize each defendant in his relation to the mass." *Kotteakos* v. *United States*, 328 U.S. 750, 773 (1946).[24] These safeguards were totally missing in Petitioners' trials, and the result was a denial of constitutional rights under the Sixth and Fourteenth Amendments.

B. The prosecution suppressed evidence contradicting its case.

At the first trial the Commonwealth relied almost entirely on the extensive but uncorroborated testimony of Heath (an unindicted co-conspirator)[25] regarding four purported luncheon meetings in Boston restaurants—three in mid-summer 1962 attended by Heath, Hanley, and Glynn and one in October 1962 at Purcell's restaurant attended by Heath, Glynn, and a Household Finance employee (Pratt)—and a subsequent New York City meeting. Heath testified to supposedly incriminating conversations at the Boston meetings, which were painted as the genesis of the conspiracy and bribery "program".

For this same period (June 1 to October 20, 1962), Heath submitted detailed expense account vouchers to his employer, showing the days he entertained luncheon guests and the names of his guests. Although Heath testified that bills for luncheons at which Hanley was

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[24] The "loose practice as to [the conspiracy] offense" which Mr. Justice Jackson described as "a serious threat to fairness in our administration of justice" (*Krulewitch* v. *United States*, 336 U.S. 440, 445, 446 (1949) (concurring opinion)) prevails in Massachusetts prosecutions. Toomey, *Some Procedural Aspects of the Prosecution of a Conspiracy in The Commonwealth of Massachusetts*, 53 Mass. L.Q. 207, 248-49 (1968).

[25] In its closing argument the Commonwealth stated not only that Heath was "the core" of its case, but that "without Mr. Heath there is no question that you have no case." I Tr. 7117, 7127.

entertained were split among himself and other industry representatives, the only expense account voucher during the summer of 1962 which listed Hanley as a guest and indicated a splitting of the bill was for a meeting at which there was no conspiratorial talk (I Tr. 3451, 3514-16). The Commonwealth stipulated that the expense account vouchers for the period during which the Purcell's meeting allegedly took place showed that on every day when Heath was in Boston he had luncheon guests whose names appeared on the vouchers, and that on no occasion during such period did he report lunching with Glynn or Pratt. II Tr. 6717-23; App. 174a. The vouchers, which were in the Commonwealth's exclusive control, thus directly contradict Heath's testimony that any of the Boston meetings took place. The Commonwealth's intentional suppression of these vouchers and the fact that they existed violated fundamental due process commands. *Giglio* v. *United States*, 40 U.S.L.W. 4209 (U.S. Feb. 24, 1972); *Giles* v. *Maryland*, 386 U.S. 66 (1967); *Brady* v. *Maryland*, 373 U.S. 83, 87 (1963); *Napue* v. *Illinois*, 360 U.S. 264, 269-70 (1959).

These vouchers had been used at the secret Massachusetts Crime Commission hearings which preceded the first trial and at the Grand Jury proceedings.[26] During the first trial the Commonwealth produced portions of the transcripts of both said proceedings, but withheld the portions in which the vouchers were mentioned. When defense counsel specifically requested the remaining transcripts,[27] the prosecution

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[26] App. 22a-24a; Crime Comm. Tr., December 11, 1963, at 112; Grand Jury Tr., April 14, 1964, at 5101, 5107-08; April 16, 1964, at 5438; April 28, 1968, at 6452.

[27] The prosecutor's refusal to turn over the additional transcript volumes (misrepresented by him as irrelevant) prevented defense counsel from expressly demanding that the well-concealed vouchers

repeatedly asserted that the three disclosed transcripts "are the only ones that have anything in them that has to do with this case."[28] The trial court found that the defendants had diligently sought everything that might be helpful to them and that the prosecution had not made either the vouchers or transcripts available even though they were in the prosecution's possession.[29] It was only when Heath testified during the second trial that the vouchers were inadvertently disclosed by him.

At the hearing on Beneficial's motion for new trial following that disclosure, the reason for the suppression of evidence became clear. Heath testified: "* * * I was promised that expense vouchers would not be used in this case * * *" (II Tr. 7473) and "It was my understanding the expense accounts were not to be used at any trial" (II Tr. 7556). Far from denying any knowledge of the vouchers or Heath's assertions, the prosecutor admitted: "I told him that I understood his hope and request that they would not become in any way involved in any public proceedings and I told him I would do what I could to accomplish that as long as my efforts did not interfere with the proper investigation of the matter * * *."[30] II Tr. 10441-42.

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themselves be provided. In light of defendants' specific request for the transcript volumes which would have revealed the vouchers' existence, and their general requests for disclosure of all exculpatory or helpful material, this case does not present the question in *People* v. *Moore*, 42 Ill. 2d 73, 246 N.E. 2d 299 (1969), *cert. granted* sub nom. *Moore* v. *Illinois*, 403 U.S. 953 (No. 5056, 1970 Term), namely, whether a request by the defendant is an indispensable prerequisite to the disclosure of exonerating evidence by the State.

[28] I. Tr. 3505 (Crime Commission transcript). As to suppressed transcripts of both said proceedings, see also I Tr. 3359-3403, 3462-3506, 3617-3622 (particularly at 3486-87, 3491, 3503-06).

[29] *Cf.* App. 27a and 24a with *United States* v. *Miller*, 411 F. 2d 825, 831-832 (2d Cir. 1969).

This Court's decisions have consistently found due process violations where material evidence favorable to the accused has been suppressed, regardless of the prosecution's good faith. *Giglio* v. *United States, supra; Miller* v. *Pate,* 386 U.S. 1 (1967); *Brady* v. *Maryland, supra*; *Alcorta* v. *Texas,* 355 U.S. 28 (1957); *Pyle* v. *Kansas,* 317 U.S. 213 (1942). It is difficult to conceive of evidence that could have been of greater importance to Beneficial, since the vouchers contradict the uncorroborated testimony of the Commonwealth's only substantive witness. Beneficial was prevented from fully cross-examining Heath, whose "reliability" was "determinative of guilt or innocence" (*Napue* v. *Illinois, supra,* 360 U.S. at 269), because crucial evidence that could have been used for impeaching him was denied by the Commonwealth's deliberate suppression of the vouchers.[31]

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[30] The prosecutor carried out such "understanding" by excising from the grand jury transcripts to be disclosed those portions containing testimonial references to the vouchers and by withholding production of volumes of the Crime Commission transcripts in which the vouchers were mentioned.

[31] Less significant curtailment of cross-examination of a key witness was found to be violative of due process in *United States* v. *Wolfson,* 437 F. 2d 862, 874 (2d Cir. 1970), and *United States* v. *Padgent,* 432 F. 2d 701, 704 (2d Cir. 1970) ("An accomplice's testimony implicating a defendant as a perpetrator of a crime is inherently suspect for such a witness may well have an important personal stake in the outcome of the trial").

Moreover, the burden was on the Commonwealth "to prove beyond a reasonable doubt that the [constitutional] error complained of did not contribute to the verdict obtained." *Chapman* v. *California,* 386 U.S. 18, 24 (1967). The courts below erroneously failed to place this burden on the Commonwealth, which burden, on the basis of the present record, it could not and did not satisfy.

C. Beneficial was twice placed in jeopardy for the same offense.

The Commonwealth's evidence, as viewed favorably to the prosecution, showed that the small loans industry had conspired continuously from 1957 to 1964 to bribe Hanley. Rather than seeking one conspiracy indictment to be prosecuted at one trial, the Commonwealth secured two virtually identical conspiracy indictments (see Exhibit C to this Petition), phrased in such general language "that the same facts could have been used to support a conviction for both" (App. 76a). Convicted under Indictment 11900 at the first trial and Indictment 11908 at the second trial, Beneficial received cumulative fines. By rejecting Beneficial's argument that the Commonwealth's action violated the Double Jeopardy Clause, the Massachusetts Supreme Judicial Court has told prosecutors that they can carve up a continuous course of conduct into any number of segments and can prosecute the segments in any order. If the defendants are acquitted at the initial trial, or do not receive the punishment sought by the prosecution, the state can then retry the defendants on another segment of the same conspiracy with substantially the same evidence. This novel view of the Double Jeopardy Clause is hardly consistent with this Court's opinions.[32]

In dismissing Beneficial's double jeopardy argument, the Massachusetts Supreme Judicial Court erroneously viewed the issue as a "pre-trial" question, stating that bills of particulars (and another document) filed by the Commonwealth showed that despite identical charging language, the indictments related to two conspiracies (App. 75a). That court ignored

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[32] This Court's application of the Double Jeopardy Clause to state prosecutions in *Benton* v. *Maryland*, 395 U.S. 784 (1969), has been accorded "fully 'retroactive' effect". *Ashe* v. *Swenson*, 397 U.S. 436, 437 n.1 (1970).

the fact that the evidence *actually introduced* at the two trials established one conspiracy. The cases are clear that "the record of both proceedings may be referred to and findings and conclusions as to identity of offenses based thereon in conjunction with the two indictments." *Arnold* v. *United States*, 336 F. 2d 347, 351 (9th Cir. 1964), *cert. denied*, 380 U.S. 982 (1965).[33] The governing principle was stated in *Braverman* v. *United States*, 317 U.S. 49, 54 (1942):

> * * * the precise nature and extent of the conspiracy must be determined by reference to the agreement which embraces and defines its objects. Whether the object of a single agreement is to commit one or many crimes, it is in either case that agreement which constitutes the conspiracy which the statute punishes. The one agreement cannot be taken to be several agreements and hence several conspiracies because it envisages the violation of several statutes rather than one.[34]

Viewed in that light, the evidence actually introduced at both trials shows a single conspiracy.

Heath, the Commonwealth's key witness in the first trial, testified at both trials to the existence of a "loose-knit committee" consisting of himself, Glynn and Pratt

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[33] See also *United States* v. *Palermo*, 410 F. 2d 468, 470-471 (7th Cir. 1969); *Harlow* v. *United States*, 301 F. 2d 361, 375 (5th Cir.), *cert. denied*, 371 U.S. 814 (1962).

[34] Similarly, in *United States* v. *Kissel*, 218 U.S. 601, 607 (1910), this Court said that when an alleged scheme "contemplates bringing to pass a continuous result that will not continue without the continuous cooperation of the conspirators to keep it up, and there is such continuous cooperation, it is a perversion of natural thought and of natural language to call such continuous cooperation a cinematographic series of distinct conspiracies, rather than to call it a single one." See also ALI, *Model Penal Code* § 5.03, p. 84 (Proposed Official Draft, 1962); § 5.03, Commentary, pp. 129-130 (Tentative Draft No. 10, 1960).

to oversee consumer finance matters in Massachusetts. *Cf.* I Tr. 3422 with II Tr. 4910. At the first trial, Heath testified in detail about two meetings, one at Purcell's Restaurant in Boston and another in New York City (I Tr. 3529-30, 3563-82, 3590-3849). The Massachusetts Supreme Judicial Court stated that the conspiracy prosecuted in the first trial was "completed" at the New York meeting, the preparations therefor having been laid at the Purcell's meeting. App. 103a. In the second trial Heath again testified about the Purcell's and New York meetings (II Tr. 4984-5100; 5123-55), which the Supreme Judicial Court characterized as "crucial" in showing the existence of the "overall" conspiracy (App. 212a). In addition, Heath testified at both trials to numerous other meetings among the same participants to establish *both* the "overall" conspiracy and the carved-out conspiracy related to the 1962 Rate Board hearings. Indeed, there was no significant meeting about which Heath testified at the first trial but not at the second. The proof at the two trials shows clearly that the "first" conspiracy was included within the "second", and that Beneficial was convicted and punished twice for the same offense.[35]

Furthermore, as interpreted even by early common law, the guarantee that "no one shall be twice vexed for one and the same cause" prohibits both retrial for the

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[35] In *United States* v. *H. E. Koontz Creamery, Inc.*, 257 F. Supp. 295 (D. Md. 1966), the court held that a conviction of dairy companies for conspiring to fix the price of milk sold to Baltimore schools (during 1946-57 and 1959-60) barred subsequent prosecution for conspiring to fix the price of milk sold to non-institutional Baltimore retailers and wholesalers (during 1956-60), even though there were some differences between the defendants and the time periods in the two prosecutions. The facts in *Koontz* strikingly parallel those presented by the Commonwealth's witnesses in the instant cases.

same "offense" and retrial of any aspect of the same transaction.[36] Recently, three members of this Court expressly reaffirmed that the Double Jeopardy Clause reflects this common law guarantee.[37] It was clearly violated here. Both indictments were returned on the same day. They encompassed the same continuing course of conduct and object. Indeed, the Commonwealth stated prior to the first trial, "it is our position that the whole batch of them [all of the pending indictments] have to do with *one single course of conduct* in which all of these people were in one way or another joined and that they should all be tried together." Pre-Trial Tr., November 15, 1964, at 36; December 4, 1964, at 23 (emphasis added). Here there was no "unavoidable necessity" (*Ashe* v. *Swenson*, *supra*, at 460) that required successive prosecutions of the same defendants. On the contrary, the prosecution could simply have proceeded separately against each group of defendants (one company and its employees) on one conspiracy indictment. The failure to adopt that course of action violated the Double Jeopardy Clause—and highly prejudiced each group of defendants by exposing it to two shockingly lengthy prosecutions.

D. The submission of special questions violated fundamental constitutional rights.

At the conclusion of the first trial, despite defense objections (note 11, *supra*), the court submitted to the jury prepared verdict forms setting out certain "spe-

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[36] Comment, *Statutory Implementation of Double Jeopardy Clauses: New Life for a Moribund Constitutional Guarantee*, 65 Yale L.J. 339, 340-343 (1956).

[37] *Ashe* v. *Swenson*, *supra*, 397 U.S. at 453-454, 459-460 (concurring opinion). See also, Comment, *Twice in Jeopardy*, 75 Yale L.J. 262, 288, 292-294 (1965); ALI *Model Penal Code* §§ 1.07(2), 1.09(1)(b) (Proposed Official Draft, 1962); Note, *Criminal Law—Double Jeopardy*, 24 Minn. L. Rev. 521, 546-558 (1940).

cial questions" concerning each of the two substantive bribery counts against particular defendants. An example of these forms follows:

> Indictment No. *11,966* charges in Count One thereof that Francis T. Glynn did "give, offer and promise" a bribe to Martin J. Hanley, as more fully alleged therein. The Jury is required to answer the following special questions in relation thereto:
>
> 1. (a) Did the defendant Francis T. Glynn give a bribe to Martin J. Hanley as alleged in this Count?
>
> ANSWER: (YES ...)
> (No ....)
>
> (b) If your answer to question 1 (a) above is "YES," in what city and state did he do so?
>
> ANSWER:
> At: .....
>
> 2. Did the defendant Francis T. Glynn offer a bribe to Martin J. Hanley as alleged in this Count?
>
> ANSWER: (YES ...)
> (No ....)
>
> 3. Did the defendant Francis T. Glynn promise a bribe to Martin J. Hanley as alleged in this Count?
>
> ANSWER: (YES ...)
> (No ....)
>
> THE VERDICT OF THE JURY ON THIS COUNT ONE IS:
> GUILTY ( ) OR NOT GUILTY (.)

As the form shows, and as the trial court instructed, these special questions had to be answered *before* the jury determined the general issue of each defendant's guilt or innocence on these counts.[38] The ruling of the

[38] Thus, the trial court explained that "as to each such count the Court is asking the jury to answer some special questions *and then*

Massachusetts Supreme Judicial Court approving the use of these questions directly conflicts with the holding of the First Circuit in *United States* v. *Spock*, 416 F.2d 165 (1st Cir. 1969). Speaking for a unanimous First Circuit, Chief Judge Bailey Aldrich gave a thorough and authoritative explication of a criminal defendant's fundamental right to a general, unqualified verdict, declaring in part:

> There is no easier way to reach, and perhaps force, a verdict of guilty than to approach it step by step. * * * By a progression of questions each of which seems to require an answer unfavorable to the defendant, a reluctant juror may be led to vote for a conviction which, in the large, he would have resisted. * * *
>
> * * * The constitutional guarantees of due process and trial by jury require that a criminal defendant be afforded the full protection of a jury unfettered, directly or indirectly. [416 F.2d at 182]

Other Federal Circuits are now in conflict on this point,[39] and at least one Court of Appeals has termed the issue of special verdicts "a basic and recurring problem in the administration of criminal justice."[40]

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to give its general verdict" (1 Tr. 7307; emphasis added). The jury answered the first special question "NO"; left the second question blank; and answered the third and fourth questions "YES." All defendants as to which special questions were submitted were found guilty on both substantive counts.

[39] Special verdicts have been condemned in the First, Third, Eighth and Ninth Circuits. *United States* v. *Spock*, *supra*; *United States* v. *Noble*, 155 F.2d 315 (3d Cir. 1946); *Gray* v. *United States*, 174 F.2d 919 (8th Cir.), *cert. denied*, 338 U.S. 848 (1949); *Anderson* v. *United States*, 273 Fed. 677 (9th Cir. 1921). They have been at least tacitly permitted in the Second and Fifth Circuits (*United States* v. *Ogull*, 149 F. Supp. 272 (S.D. N.Y. 1957), *aff'd sub nom. United States* v. *Gernie*, 252 F. 2d 664 (2d Cir.), *cert. denied*, 356 U.S. 968 (1958); *United States* v. *James*, 432 F. 2d 303 (5th Cir. 1970)), but only under special circumstances.

[40] *United States* v. *Gallishaw*, 428 F. 2d 760, 764 (2d Cir. 1970).

The questions in the instant case were of a much more pervasive and prejudicial nature than those in *Spock*. The *Spock* jurors were instructed to answer their special questions only after and if they had reached a general verdict of guilty (416 F.2d at 183). Here, by contrast, the questions had to be answered before the jury reached the issue of guilt or innocence. Moreover, far from being innocuous, these questions and their introductory instruction used the word "bribe" four times in the course of a few short, sharp sentences. The jury's attention was thus riveted upon a specific crime before it even faced the central issue of guilt, all in violation of the Sixth and Fourteenth Amendments.[41]

E. The procurement of indictments violated Petitioners' due process rights.

During the entire time the Grand Jury was deliberating and voting on the several indictments which resulted in these long and burdensome criminal trials, from two to five prosecutors were present in the grand jury room, pointing out various pieces of evidence to the jurors and explaining different matters of law and language relating to the indictments they wanted the jury to return. Prior to trial and again on appeal, defendants argued that obtaining criminal indictments

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[41] For decades most courts and commentators have found that due process guarantees a defendant the unconditional right to a single, general response from the jury, and have warned that directing a jury to answer certain specific questions inevitably tends to "catechize" it in its deliberations and to encroach upon its time-honored role as the collective conscience of the community in branding the defendant innocent or guilty. Morgan, *A Brief History of Special Verdicts and Special Interrogatories*, 32 Yale L.J. 575, 592 (1923); 2 Wright, *Federal Practice and Procedure* (Criminal) § 512 (1969). As one author has said: "It is one of the most essential features of the right to trial by jury that no jury should be compelled to find any but a general verdict in criminal

in this manner was inevitably coercive and violated their due process rights under the Fourteenth Amendment (see note 3, *supra*).

The most critical and sensitive point in any Grand Jury proceeding occurs when the jurors weigh and discuss the evidence presented to them and then vote as to whether or not an indictment should issue. Since at least *Earl of Shaftsbury's Case*, 8 How. St. Tr. 759 (1681), Anglo-American jurisprudence has been committed to the principle that the grand jurors should deliberate upon the evidence in absolute privacy in order to satisfy their own consciences about the matters involved and to reach a decision thereon free from the slightest suggestion of pressure or influence.[42] There is a presumption of prejudice if an unauthorized person is present during deliberation and voting, and the mere presence of a prosecutor "while the grand jury is deliberating *though he says nothing*, may be ground for quashing an indictment."[43]

In the instant case, the conduct of the prosecutors during the Grand Jury's deliberations and voting went shockingly beyond presence and silence. Though the

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cases, and removal of this safeguard would violate its design and destroy its spirit." G. Clementson, *Special Verdicts and Special Findings by Juries* 49 (1905). In addition to catechizing the jurors, the special verdicts in this case undoubtedly confused them. After instructing the jurors that the crime involved giving, offering *or* promising a bribe (I. Tr. 7264), the trial court provided the jury with special verdict forms which referred to the crime of giving, offering *and* promising a bribe. The completed forms, indicating that no bribes were given but that defendants were guilty, were fatally inconsistent on their face.

[42] See generally, 38 Am. Jur. 2d *Grand Jury* §§ 34-35 (1968), and cases there cited. This well-established protection has been codified in Federal Rule of Criminal Procedure 6(d).

[43] 1 Orfield, Criminal Procedure Under The Federal Rules § 6:73 (1966) (emphasis added; footnote omitted).

prosecutors had been working with the Grand Jury on a daily basis for over three and a half months, presenting their evidence and taking the jurors step-by-step through the case they wished the jury to accept, when it finally came time for the jurors to deliberate on the evidence and vote on the issuance of indictments, the prosecutorial team did not withdraw from the Grand Jury's presence. Quite to the contrary, they conspicuously increased the focus of prosecutorial pressure on the jurors.

All of the indictments in the case were returned on May 8, 1964, though deliberation thereon began the previous afternoon. The prosecutorial team had already drawn up 129 separate indictments and had divided them into six or seven groups. In presenting the indictments, one of two Assistant Attorneys General who had been with the jury throughout its work directed the jurors' attention "to the area of the evidence on which they were being *asked to deliberate*" and read the indictment being offered. App. 8a (emphasis added).[44]

This process completed, the foreman asked the jury for its vote. After the jurors voted to return the first group of indictments, the foreman signed them. One of the Assistant Attorneys General then picked up the indictments and presented them to Honorable Edward W. Brooke, Attorney General of the Commonwealth, for his signature. At counsel table along with Attorney General Brooke, who had earlier appeared only occasionally before the Grand Jury, was the chief of the Criminal Division of the Attorney Gen-

[44] The facts stated herein relating to the conduct of the Grand Jury hearings were all found by the trial court following Defendants' Motion to Dismiss. Pertinent parts of those findings are printed at App. 1a.

eral's office, who had not participated in the questioning of any witnesses before the Grand Jury, nor in the presentation of any evidence. App. 3a-10a.

After the first few groups of indictments were presented, an Assistant Attorney General would simply inform the Grand Jury that he was offering the same kind of indictment as a designated one already voted on and would then read the names, date or places which might be different. None of the indictments presented to the Grand Jury by these prosecutors on May 7 and 8, 1964, was in any way modified by that "prosecution-initiating" body nor did it decline to return any one of the 129 indictments presented to it. App. 7a-9a.

As a formal ceremony and "capping-off" of three and a half months of close association, the above procedure was surely impressive. As an opportunity for a jury of community representatives freely and candidly to weigh all the evidence presented to them and reach an unintimidated and independent decision as to whether or not an indictment should be returned, it was a sham.[45] In addition to their inevitably coercive presence throughout the jurors' deliberations and voting, the prosecutorial team also enlisted the aura of the State Legislature on their side by having the case presented to the Grand Jury principally by an agent of the General Court (the Massachusetts Legislature), a

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[45] This Court has declared that a state need not initiate its criminal prosecutions by Grand Jury indictment. *Hurtado* v. *California*, 110 U.S. 516 (1884). However, it is clear that, having elected to commence its prosecutions through Grand Jury proceedings, a state has a constitutional obligation to do so in a fundamentally fair fashion that comports with due process of law. *Cassell* v. *Texas*, 339 U.S. 282 (1950). See also *Beck* v. *Washington*, 369 U.S. 541, 546 (1962); *United States ex rel. Chestnut* v. *Criminal Court of the City of New York*, 442 F.2d 611, 616 (2d Cir. 1971); *Connor* v. *Picard*, 434 F.2d 673, 674 (1st Cir. 1970), *rev'd on other grounds*, 40 U.S.L.W. 4088 (U.S. Dec. 20, 1971).

staff attorney of the recently created Massachusetts Crime Commission who was specially appointed as an Assistant Attorney General solely to handle this presentation. App. 54a. Indeed, seated in a judicial setting with the Attorney General of the Commonwealth and an officer of the State Legislature watching their every vote, the grand jurors could well have concluded that all three branches of the state government were unanimously and officially committed to the fact that these indictments should issue and that their own assent was a foregone conclusion. Earlier highly improper examination by police officials would naturally reinforce this conclusion and indicate to the jurors that they had been specially selected to further an important campaign of stamping out corruption in state government.[46]

In view of the evidence that these indictments were obtained through improper, high-pressure, and inevitably coercive prosecutorial techniques, that from two to five prosecutors were present at all times while the Grand Jury deliberated and voted, and that at *no* time did these jurors perform their essential function of freely and privately weighing the prosecutor's evidence and then secretly casting their individual votes yea or nay on whether he should obtain the indictment sought, the convictions below should be reversed.

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[46] After their names were drawn but before they were summoned to serve, many of the jurors had been subjected to considerable prejudicial questioning by police officials, through mail, telephone and in-person contacts, about such matters as their style of living, character and associates, habits, and political views. App. 65a-69a. All of this was in obvious violation of the well established due process principle prohibiting the government from making *ex parte* contacts with persons who are about to pass on the government's case for an indictment, since such government investigation "is bound to impress the juror and is very apt to do so unduly." *Remmer* v. *United States*, 347 U.S. 227, 229 (1954).

CONCLUSION

This Court and its individual Justices have repeatedly pointed out the dangers to personal liberty and justice inherent in complex, lengthy, multi-defendant conspiracy trials. All of the excesses warned against in previous cases were present in abundance in the two trials below. Even if they were the only issues, this case would be an almost classic one for the Court to announce limitations on a State's power to obtain convictions through mass confusion. But when such trials are also the backdrop for a series of individual denials of constitutional rights—police questioning of Grand Jurors, prosecutorial presence during Grand Jury voting, *ex parte* contacts with the trial judge, prejudicial publicity, suppression of vital evidence, catechizing questions to the petit jurors, and the infliction of double jeopardy—fundamental limits imposed by the Constitution have so clearly been exceeded that the whole criminal justice system is called into question. It is in just such cases that certiorari is particularly appropriate.

Respectfully submitted,

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EXHIBIT A*

EXMT.	11900								COUNT I								11910								COUNT II							
	BARBER	PRATT	HOUSEHOLD	FARRELL	GLYNN	BENEFICIAL	WOODCOCK	LIBERTY	BARBER	PRATT	HOUSEHOLD	FARRELL	GLYNN	BENEFICIAL	WOODCOCK	LIBERTY	BARBER	PRATT	HOUSEHOLD	FARRELL	GLYNN	BENEFICIAL	WOODCOCK	LIBERTY	BARBER	PRATT	HOUSEHOLD	FARRELL	GLYNN	BENEFICIAL	WOODCOCK	LIBERTY
10																	X	X	X	X	⊗	X	X	X					⊗	X		
11																	X	X	X	X	⊗	X	X	X					⊗	X		
12		⊗	X		⊗	X				⊗	X		⊗	X				⊗	X		⊗	X	X			⊗	X		⊗	X		
13					⊗	X							⊗	X							⊗	X				⊗	X		⊗	X		
14		⊗	X							⊗	X							⊗	X							⊗	X		⊗	X		
15					⊗	X							⊗	X							⊗	X							⊗	X		
16				⊗		X						⊗		X						⊗		X						⊗		X		
17					⊗	X							⊗	X							⊗	X							⊗	X		
18		⊗	X							⊗	X							⊗	X							⊗	X					
19		⊗	X		⊗	X				⊗	X		⊗	X				⊗	X		⊗	X				⊗	X		⊗	X		
20		⊗	X	⊗	⊗	X	⊗	X		⊗	X	⊗	⊗	X	⊗	X		⊗	X	⊗	⊗	X	⊗	X		⊗	X	⊗	⊗	X	⊗	X
21		⊗	X		⊗	X				⊗	X		⊗	X				⊗	X		⊗	X				⊗	X		⊗	X		
22-25					⊗	X															⊗	X										
26					⊗	X							⊗	X							⊗	X							⊗	X		
27					⊗	X							⊗	X							⊗	X							⊗	X		
28		⊗	X		⊗	X				⊗	X		⊗	X				⊗	X		⊗	X				⊗	X		⊗	X		
31					⊗	X							⊗	X							⊗	X							⊗	X		
35																	X	X	X	X	⊗	X	X	X					⊗	X		
36	X	X	X	X	⊗	X	X	X	X	X	X	X	⊗	X	X	X	X	X	X	X	⊗	X	X	X					⊗	X		
42	⊗	X	X	X	X	X	X	X	⊗		X						⊗	X	X	X	X	X	X	X	⊗	X	X	X	X	X		
43	X	X	X	X	⊗	X	X	X					⊗	X			X	X	X	X	⊗	X	X	X	X	X	X	X	X	X		
45	X	X		X	⊗		X										X	X		X	⊗		X		X	X		X	⊗			
46	X	X	X	X	⊗	X	X	X	X	X	X	X	⊗	X	X	X			X		⊗	X		X			X		X	⊗		
47	X	X	X	X	⊗	X	X	X	X	X	X	X	⊗	X	X	X	X	X	X	X	⊗	X	X	X	X	X	X	X	⊗	X	X	X
48					⊗	X							⊗	X																		

CHART I

⊗ ~ *original admission*

X ~ *subsequent admission. (November 2, 1966)*

* Chart I shows the original and extended limitations as to certain items of the Commonwealth's evidence introduced in the first trial, namely, certain of those items numbered 10 through 48 in the trial court's announcement to the jury on November 2, 1966, of the extended limitations (I Tr. 5202-39). The four columns show the indictments or counts on which each item was admitted as to one or more defendants. The first column (marked "11900") relates to the indictment charging conspiracy to bribe Hanley; the second column ("Count I"), to count I of each substantive indictment, charging bribery of Hanley; the third column ("11910"), to the indictment charging conspiracy to bribe Garfinkle; and the fourth column ("Count II"), to count II of each substantive indictment, charging bribery of Garfinkle.

EXHIBIT B*

	11908								
ITEMS	BENEFICIAL	NEWHALL	FARRELL	GLYNN	HOUSEHOLD	BARBER	PRATT	LOCAL	HANLEY
1	X	X		X				X	⊗
2	X	⊗		X					
3	X	⊗		X	X				
4	X	⊗		X					
5	X	⊗		X					
6	X	X		X				⊗	
7	X	⊗		X				⊗	⊗
8	X	⊗		X				⊗	⊗
9	X	⊗		X				⊗	⊗
10	X	X		X				⊗	⊗
11	X	X		X				⊗	⊗
12	X	⊗		X				⊗	⊗
13	X		X	⊗	X				
14	X			⊗	X			⊗	⊗
15	X			⊗	X		X	⊗	⊗
16	X			⊗	X		X		
17	X		X	⊗	X		X	⊗	⊗
18	X							⊗	
19	X			⊗					⊗
20	X	⊗		X				⊗	⊗
21	X	⊗		X					
22	X	⊗		X				⊗	
23	X			X				⊗	⊗
24	X			X				⊗	⊗
25	X			X				⊗	
26	X			⊗					
27	X		⊗	⊗	X				
28	X		⊗	⊗	X				⊗
29	X		⊗	⊗	X				⊗
30	X		⊗	⊗			X		⊗
31	X		⊗	⊗	X		X		⊗
32	X		⊗	⊗	X		X		
33	X		⊗	⊗	X		X		⊗

	11908								
ITEMS	BENEFICIAL	NEWHALL	FARRELL	GLYNN	HOUSEHOLD	BARBER	PRATT	LOCAL	HANLEY
34	X		⊗	⊗	X		X		
35	X		⊗	⊗	X		X		
36	X		⊗	⊗	X		X		
37	X		⊗	⊗	X		X		⊗
38	X		⊗	⊗	X		X		
39	X		⊗	⊗	X	X	X		⊗
40	X		⊗	⊗	X		⊗		
41	X		⊗	⊗	X		X		
42	X		⊗	⊗	X		X		⊗
43	X		⊗	⊗	X		⊗		
44	X		⊗	⊗	X	X	⊗		
45	X		⊗	⊗	X	X	⊗		
46	X		⊗	⊗	X	⊗	⊗		
47	X		⊗	⊗	X	X	X		
48	X		⊗	⊗	X		⊗		
49	X		X	X	X		⊗		
50	X		X	⊗	X		X		
51	X		X	⊗	X		X		
52	X		X	X	X	⊗	⊗		
53	X		X	⊗	X	X	X		
54			X	X	X		X		⊗
55	X		X	X	X		X		⊗
56	X		X	X	X		X		⊗
57	X		X	⊗	X		X		⊗
58	X		X	⊗	X		X		⊗
59	X		X	⊗	X		X		⊗
60	X		X	⊗	X		X		⊗
61	X		X	⊗	X		X		⊗
62	X		X	⊗	X		X		⊗
63	X		X	⊗	X		X		⊗
64	X			⊗				⊗	⊗
65	X		X	⊗	X		X		⊗
66	X		X	⊗	X		X		⊗

CHART II

⊗-original admission
X-subsequent admission (December 12, 1967)

* Chart II shows the original and extended limitations as to

EXHIBIT C

Indictment 11900 — First Trial *

* * *

THE JURORS for the COMMONWEALTH OF MASSACHUSETTS on their oath present that

BENEFICIAL FINANCE CO., a Delaware corporation; BENEFICIAL MANAGEMENT CORPORATION, a Delaware corporation; HOUSEHOLD FINANCE CORPORATION, a Delaware corporation; STATE LOAN AND FINANCE CORPORATION, a Delaware corporation; STATE LOAN AND FINANCE MANAGEMENT CORPORATION, a Delaware corporation, LIBERTY LOAN CORPORATION, a Delaware corporation; FAMILY FINANCE CORPORATION, a Delaware corporation, FAMILY FINANCE MANAGEMENT CORPORATION, a Delaware corporation, JOHN M. FARRELL, FRANCIS T. GLYNN, HAROLD L. HAUGAN, NATHANIEL W. BARBER, JAMES S. PRATT, GORDON J. THOMASCH, LYLE S. WOODCOCK and AUSTIN R. GODSHALL,

at Boston, within the County of Suffolk, and at divers other places during the period of six years

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certain items of the Commonwealth's evidence introduced at the second trial with respect to Indictment 11908 (charging conspiracy to bribe Hanley), namely, the items numbered 1 through 66 in the trial court's announcement to the jury on December 12, 1967, of the extended limitations (II Tr. 6016-33).

* Identical language in the two indictments has been underscored. In summary, the two indictments were virtually identical with regard to defendants, co-conspirators and the duration of the conspiracy, and with regard to the object of the conspiracy, they were exactly alike. Indictment 11900 (first trial) charged a conspiracy to bribe Hanley during the period May 8, 1958 to May 8, 1964, among 16 named defendants and four named co-conspirators. Indictment 11908 (second trial) charged a conspiracy to bribe Hanley during the period January 1, 1957 to May 8, 1964, among 18 defendants and eight named co-conspirators (including 11 defendants and four co-conspirators named in Indictment 11900). The charging language in the two indictments was identical.

next preceding the finding and filing of this indictment did conspire together and with other persons including American Investment Company of Illinois, a Delaware corporation, Public Finance Company, a California corporation, J. Miller Redfield and William F. Heath, who are named herein as co-conspirators but not as defendants, and divers other persons whose names to the said Grand Jurors are unknown, corruptly to give, offer and promise, jointly and severally, to Martin J. Hanley, an executive officer of the Commonwealth of Massachusetts, to wit: the supervisor of loan agencies and deputy commissioner of the Division of Banks and Loan Agencies in the Department of Banking and Insurance, he having been duly appointed and qualified as such officer, gifts and gratuities with intent to influence his act, vote and opinion, decision and judgment upon any matter, question, cause and proceeding which was then pending, and might by law come and be brought before him in his official capacity, and as a consideration for speech, work and service in connection therewith.

A TRUE BILL.

* * *

Indictment 11908 — Second Trial

* * *

THE JURORS for the COMMONWEALTH OF MASSACHUSETTS on their oath present that

BENEFICIAL FINANCE CO., a Delaware corporation; BENEFICIAL MANAGEMENT CORPORATION, a Delaware corporation; HOUSEHOLD FINANCE

CORPORATION, a Delaware corporation; FAMILY FINANCE CORPORATION, a Delaware corporation; FAMILY FINANCE MANAGEMENT CORPORATION, a Delaware corporation; LOCAL FINANCE CORPORATION, a Rhode Island corporation; LIBERTY LOAN CORPORATION, a Delaware corporation; DEWITT J. PAUL, EDWARD R. NEWHALL, JOHN M. FARRELL, FRANCIS T. GLYNN, MARLIN E. LERCH, JAMES S. PRATT, NATHANIEL W. BARBER, CALVERT I. BEAN, LYLE S. WOODCOCK, WARREN E. ENGLE and JOHN DOE, a representative, agent and employee of the aforesaid Family Finance Corporation and Family Finance Management Corporation whose true name is to the said Grand Jurors unknown,

at Boston, within the County of Suffolk, and at divers other places during the period commencing on or about the first day of January in the year of our Lord one thousand nine hundred and fifty-seven, and continuing up to and including the day of finding and filing of this indictment conspired together and with other persons including American Investment Company of Illinois, a Delaware corporation, Public Finance Company, a California corporation, Merchants Acceptance Corporation, a Massachusetts corporation and M-A-C Management Corporation, a Massachusetts corporation, J. Miller Redfield, William F. Heath, Charles T. MacDermott, Jr., and Louis Schwartz, who are named herein as co-conspirators but not as defendants, and divers other persons whose names to the said Grand Jurors are unknown, corruptly to give, offer and promise, jointly and severally, to Martin J. Hanley, an executive officer of the Commonwealth of Massachusetts, to wit: the Supervisor of Loan Agencies and a Deputy Com-

missioner in the Division of Banks and Loan Agencies in the Department of Banking and Insurance, he having been duly appointed and qualified as such officer, gifts and gratuities with intent to influence his act, vote and opinion, decision and judgment upon any matter, question, cause and proceeding which was then pending, and might by law come and be brought before him in his official capacity, and as a consideration for speech, work and service in connection therewith; and the said Grand Jurors do further present that between the first day of January in the year of Our Lord one thousand nine hundred and fifty-seven, and the date of finding and filing of this indictment the above named defendants Dewitt J. Paul, Edward R. Newhall, Warren E. Engle, Marlin E. Lerch, Lyle S. Woodcock, and John Doe were not usually and publicly resident within the Commonwealth of Massachusetts.

A TRUE BILL.

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